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STATE OF MICHIGAN
IN THE SUPREME COURT

ALLY FINANCIAL, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154668 Court of Appeals No. 327815 Court of Claims No. 13-49-MT
SANTANDER CONSUMER USA, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154669 Court of Appeals No. 327832 Court of Claims No. 13-114-MT
SANTANDER CONSUMER USA, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154670 Court of Appeals No. 327833 Court of Claims No. 13-113-MT

APPELLEES STATE TREASURER, STATE OF MICHIGAN, AND MICHIGAN DEPARTMENT OF TREASURY'S BRIEF IN OPPOSITION TO PLAINTIFFS / APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The General Sales Tax Act (GSTA) expressly states that the bad debt exemption from sales tax cannot include repossessed property. Ally and Santander seek a bad debt refund under the GSTA for repossessed property. Are Ally and Santander entitled to a refund for amounts involving repossessed property under the GSTA?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

2. A taxpayer seeking a bad debt refund under the GSTA must prove that sales tax was paid on the underlying sale at retail and, and must also substantiate its refund request with the documentation required by Treasury. Ally and Santander fail to provide the documentation required by Treasury to prove that sales tax was paid on the transactions at issue. Are Ally and Santander entitled to a refund under the GSTA?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

3. The GSTA requires retailers and lenders to execute and maintain a written election stating which party is entitled to claim the bad debt deduction. Ally did not execute and maintain written elections with the retailers stating which party may claim the deduction for the accounts at issue. Is Ally entitled to a refund under the GSTA?

   Appellants' answer: Yes.

   Appellees' answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

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STATUTES INVOLVED

MCL 205.54i:

(1) As used in this section:

> (a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

* * *

(3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:

> (a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.
>
> (b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

(4) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

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COUNTER-STATEMENT OF JUDGMENT

Plaintiffs-Appellants, Ally Financial, Inc. (Ally) and Santander Consumer USA, Inc. (Santander), seek leave to appeal the published Michigan Court of Appeals' opinion issued on September 20, 2016, in the consolidated cases *Ally Financial, Inc. v State Treasurer*, *et al* (Docket No. 327815), *Santander Consumer USA, Inc. v State Treasurer, et al* (Docket No. 327832), and *Santander Consumer USA, Inc. v State Treasurer, et al* (Docket No. 327833) attached as Ex A (hereinafter "Op") pursuant to MCL 600.232 and MCR 7.303(B)(1).

The State of Michigan Defendants-Appellees respectfully request that this Court deny Plaintiffs-Appellants' application based on the comprehensive analysis contained in the Court of Appeals' opinion and for the reasons set forth below.

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INTRODUCTION

In reaching its decision about the bad debt exemption to the General Sales Tax Act, the Court of Appeals applied the statute's straight-forward language. The analysis is both legally correct and unremarkable and does not raise issues of importance that requires this Court's review. This Court should deny leave.

Bad debt is a portion of debt relating to a taxable sale at retail that is worthless or uncollectable. The bad debt exemption under the General Sales Tax Act allows an eligible taxpayer to deduct bad debts, from which repossessed property is expressly excluded, from its gross proceeds used to compute its sales tax liability. MCL 205.54i sets forth several simple requirements that must be met before Treasury may issue a bad debt sales tax refund. A claimant must provide specific documentation showing that the sales tax subject to refund was actually paid to the State, that the underlying transactions must fall within the statutory definition of bad debt and, in instances where the claimant did not remit tax to the State, it must submit written election showing it is the party entitled to the refund. Here, Ally and Santander fail to meet these statutory requirements.

The Court of Appeals' opinion agreeing with Treasury's position – that bad debt cannot include any repossessed property – properly gives effect to the plain language of the MCL 205.54i(1)(a). The Court of Appeals also agreed that according to the plain language of the statute, Treasury was granted authority to determine the evidence necessary to support the refund. The Court of Appeals also correctly held that Ally's written elections were not executed and maintained with the dealerships as required by MCL 205.54i(3).

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This application for leave to appeal does not warrant this Court's review under MCR 7.305(B) for at least three reasons:

- The Court of Appeals' decision is not clearly erroneous. The Court of Appeals' decision applies the plain language of the amendments to MCL 205.54i(3). Ally and Santander failed to meet the statutory requirements to obtain a sales tax refund.

- The Court of Appeals' decision will not result in any Michigan taxpayers losing their right to a refund or deduction under the GSTA. Under the MCL 205.54i, any lender has the opportunity to obtain a sales tax refund if it meets the statutory requirements of the statute. This Court has long recognized that the burden of proving entitlement to an exemption from tax rests on the party asserting the right to the exemption. See *Andrie, Inc v Dep't of Treasury*, 496 Mich 161, 165 (2014). Here, Ally and Santander failed to meet their burden. Accordingly, the issues in this case do not hold any significant public interest.

- The Court of Appeals' decision does not conflict with the 2007 statutory amendments to the bad debt statute or the Streamlined Sales and Use Tax Administration Act (SSUTA). Rather, the decision applies the plain language of MCL 205.54i, as amended by Public Act 105 of 2007. And the SSUTA does not even apply to this case. Ally and Santander's attempt to obtain a judicial re-write of the Michigan bad debt statute is not tantamount to a legal principle of major significance to the State's jurisprudence.

For those reasons, this Court should deny leave to appeal.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Background

The underlying transactions involve the purchase of motor vehicles in Michigan. Santander is the successor in interest of CitiFinancial Auto, Ltd, formerly known as TranSouth Corporation and Arcadia Financial, Ltd, the financial services companies that financed the purchase of motor vehicles. (Santander Complaints ¶1.) Ally is the successor in interest to GMAC, LLC, and financed the purchase of the motor vehicles from various car dealerships in Michigan. (Ally Complaint ¶8.)

Retail customers enter into retail installment contracts with auto dealers to purchase vehicles. (Ally Complaint ¶9, Santander Complaints ¶13.) Both Ally and Santander finance the vehicle sales. The retail installment contracts provide for a security interest in the financed motor vehicles in favor of the auto dealers. (Santander Complaints ¶13.) The auto dealers assign their rights under the installment contracts to the financiers, Ally and Santander. (Ally Complaint ¶11; Santander Complaints ¶15.) Such rights include the right to repossess the vehicles in the event of default by the retail customer. (Ally Complaint ¶11; Santander Complaints ¶17.) When contracts go into default, Ally and Santander repossess the vehicles in most instances. (Ally Complaint ¶14; Santander Complaints ¶ 22.) Ally and Santander sell the repossessed vehicles and apply the proceeds of the sale to the balance on the account. (Ally Complaint ¶14; Santander Complaints ¶ 22.) Thereafter, unpaid balances often remain on the accounts. (Ally Complaint ¶14, Santander Complaints ¶22.) The sales tax Santander and Ally claim is attributable

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to the unpaid balances on these accounts. (Ally Complaint ¶13; Santander Complaints ¶23-24.)

Ally Financial

Treasury denies Ally's refund request

Ally requested a refund from Treasury for the time period of October 1, 2007 through June 30, 2010 in the amount of $5,675,115 "relating to the pro rata portion of sales tax relating to the unpaid balance of worthless accounts which have been charged off for federal tax purposes" that the dealerships allegedly remitted to the Secretary of State. (Ally Ex 1, GMAC letter to Treasury.)[1]

For the period beginning October 1, 2009, Treasury advised Ally that under MCL 205.54i claims for bad debt deductions must be supported by evidence required by the Department. (Ally Ex 2.)[2] Treasury requested that Ally provide evidence supporting the statutory requirements for a refund, including proof of tax paid by the seller on each transaction, in the form of RD-108 forms. (Ally Ex 2.) Treasury also reminded Ally that bad debt deductions may not include any repossessed property, interest or finance charge, sales tax charged on the original

[1] Treasury denied the refund request for the time period prior to October 1, 2009, because prior to this date only the retailer who remitted the sales tax to the Department was eligible to seek a bad debt refund. (Ex 2, Treasury letter to GMAC.) Ally does not challenge the denial of its refund request for the period prior to October 1, 2009, and now seeks a refund only for the revised period October 1, 2009 through June 30, 2010.

[2] Unless otherwise noted, all references to Ally exhibits throughout this brief are to exhibits attached to Treasury's September 15, 2014 Motion for Summary Disposition and Brief in Support.

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sale, uncollectable amounts where property remains in the possession of the vendor, or expenses incurred in connection with collections. (Ally Ex 2.) Accordingly, Treasury asked Ally to remove repossessed vehicles from its refund request. (Ally Ex 2.)

Ally submitted a spreadsheet ("Spreadsheet One") detailing the claimed overpayment of sales tax, as well as some of the RD-108s associated with the various accounts, for the revised period. (Ally Ex 3, Bowen Aff ¶ 10.) Ally requested a refund of $306,281.22, reduced from its original request of $5,675,115. (Ally Ex 3, Bowen Aff ¶ 10.) After reviewing the accounts identified on Spreadsheet One, Treasury determined that many of the accounts for which Ally sought a refund involved repossessed property. (Ally Ex 3, Bowen Aff ¶ 10.) To determine whether a vehicle had been repossessed, Treasury reviews the Secretary of State's title histories. (Ally Ex 3, Bowen Aff ¶ 13.) If the title history states "no tax," this is an indication that the vehicle has been repossessed. (Ally Ex 3, Bowen Aff ¶ 13.) Treasury then orders the entire title history, which confirms if the vehicle had been repossessed. (Ally Ex 3, Bowen Aff ¶ 13). In this case, Treasury determined that approximately $54,856 of Ally's revised refund request involved repossessed vehicles. (Ally Ex 3, Bowen Aff ¶ 14.) Ally also failed to submit a written election stating that it, as opposed to the dealerships, was the party entitled to claim the bad debt deduction. (Ally Ex 3, Bowen Aff at ¶ 11.) And it failed to provide the RD-108 forms for several of the accounts, as requested by Treasury. (Ally Ex 3, Bowen

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Aff at ¶ 11.) For all of these reasons, Treasury denied Ally's refund request in its entirety.

Following the denial of its refund request, Ally requested and received an informal conference with the Department of Treasury Hearings Division. Treasury upheld the refund denial.

The Court of Claims affirms the denial of Ally's refund request

Ally filed suit in the Court of Claims seeking a refund in the amount of $684,297. During discovery, Treasury again requested that Ally provide information and documentation required by MCL 205.54i. (Ally Ex 5, Pl's Resp to Def's First Disc Req.) Treasury specifically requested documentation showing that sales tax was paid on the transactions at issue, the written elections, and the validated RD-108 forms. (Ally Ex 5, Req for Produc #1-4, 10.)

In the course of discovery Ally submitted two additional spreadsheets, but never produced the RD-108s. In response to an order compelling production of outstanding discovery requests, Ally produced several documents titled "Agreement for Entitlement to Refund, Deduction or Credit." But all of these documents were signed and dated *after* the date Ally wrote off the bad debt for federal income tax purposes, and they apply only to "Accounts currently existing or created in the future." (Ally Ex 7, Agreement for Entitlement to Refund, Deduction or Credit.) Ally admittedly did not provide agreements for each dealership identified on its refund request. (Ally Appeal Br, p 12.)

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The Court of Claims granted summary disposition in favor of Treasury affirming Treasury's refund denial, holding that Ally failed to meet the statutory requirements for obtaining a refund under the GSTA. (Ally 5/20/15 Op, attached at Ex B.) Specifically, the Court of Claims followed the rationale in *Daimler Chrysler Services of North America, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals dated Jan. 21, 2010 (Docket No. 288347) attached as Ex C, concluding that bad debt does not include repossessed property. (Ally 5/20/2015 Op, p 6.) The Court of Claims also held that Ally failed to produce written elections covering the accounts at issue, stating "the Department was justified in rejecting election forms that do not cover the accounts for which plaintiff seeks a deduction." (Ally 5/20/2015 Op, p 3.) Further, the Court of Claims held that financing contracts do not satisfy the GSTA's written election requirement because the assignments "do not specify 'which party may claim the deduction.'" (Ally 5/20/2015 Op, p 4.)

As it relates to Treasury's position that Ally did not provide the necessary documentary evidence that sales tax was actually paid by providing verified RD-108 forms, the Court of Claims held that it "will not overrule the Department's judgment in a matter that the Legislature has explicitly placed in the Department's control" and emphasized that "the claimant has the obligation to establish the right to a refund." (Ally 5/20/2015 Op, p 5.)

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Santander

Treasury denies Santander's refund request

On May 24, 2011, Santander sent Treasury two letters asking for a sales tax refunds for the time period January 1, 2010 through December 31, 2010. In the first, Santander asked for $563,444.60 relative to accounts from TranSouth Corporation. In the second, Santander asked for $41,803.07 relative to accounts from Arcadia Financial. (Santander Exs 1, 5/24/2011 letters.)[3] Neither letter included any documentation substantiating the refund amounts sought.

In response, Treasury advised that under MCL 205.54i claims for bad debt deductions must be supported by evidence required by the Department. (Santander Exs 2, 6/2/2011 letters.) Treasury also asked Santander to provide evidence that support the statutory requirements for a refund, including: the federal identification number of each seller and proof of tax paid by the seller on each transaction. (Santander Exs 2, 6/2/2011 letters.) Citing to the statue, Treasury also advised Santander that bad debt deductions may not include any repossessed property, interest or finance charge, sales tax charged on the original sale, uncollectable amounts where property remains in the possession of the vendor, or expenses incurred in connection with collections. (Santander Exs 2.)

[3] Unless otherwise noted, all references to Santander exhibits throughout this brief are to exhibits attached to Treasury's October 27, 2015 Motions for Summary Disposition and Briefs in Support in Docket No's. 13-113-MT and 13-114-MT.

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Santander supplemented its refund request by providing two separate spreadsheets (one for TranSouth accounts and the other for Arcadia accounts). (Santander Exs 3, 6/28/2011 letters; Exs 4, spreadsheet entitled "MI Arcadia 2010", Santander Exs 4, spreadsheet entitled "MITranSouth 2010; Santander Exs 5, Aff of David Bowen.) The spreadsheets included the following types of information for thousands of separate transactions: account numbers, contract dates, charge off dates, customer names and information, dealer names and information, sales tax rates, sales tax, taxable sales price, and amounts financed. (Santander Exs 4.) The documentation did not substantiate payment of tax on the vehicle sales. (Santander Exs 5.) After review of these spreadsheets, Treasury asked Santander to remove repossessed vehicles from its refund claim and for copies of validated RD-108s for each vehicle to show that sales tax was paid. (Santander Exs 6, 7/26/2011 and 8/10/2011 letters.)

Santander supplemented its refund requests by providing revised spreadsheets for the accounts purported not to involve repossessed property. For these accounts, Santander also provided additional information, including various retail installment contracts and applications for Michigan titles (unverified RD-108 applications). (Santander Exs 7, 9/30/2011 letters; Santander Exs 8, revised spreadsheets.) Of the collective three hundred accounts that did not include repossessed property, Santander provided sufficient documentation of sales-tax payment on only eleven vehicles, which correlated to a refund of $1,562.01 ($76.14

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relative to the Arcadia accounts and $1,485.87 relative to the TranSouth accounts). (Santander Exs 5, 9-10.)

Thereafter, Treasury denied the portion of the refund attributable to repossessed vehicles. (Santander Exs 11.) But Treasury remained open to consider Santander's refund claim for the non-repossessed vehicles and again asked for documentation showing payment of sales tax in the form of either a *validated* statement of vehicle sale or *validated* copy of the receipt for RD-108 for each non-repossessed vehicle. Treasury even gave Santander additional time to provide proof of sales-tax payment. But Santander did not submit any additional documentation. As a result, Treasury denied the refund claims.

Following the denial of its refund request, Santander requested and received an informal conference with the Department of Treasury Hearings Division. Treasury upheld the refund denial.

The Court of Claims affirms the denial of Santander's refund request

Santander filed two separate lawsuits challenging Treasury's denial of its refund requests. In the first, 13-113-MT, Santander sought a refund in the amount $41,803.07 relative to the Arcadia accounts and in the second, 13-114-MT, Santander seeks a refund in the amount of $561,958.73 relative to the TranSouth accounts.

During the course of discovery, Treasury served written discovery requests on Santander seeking documentation to support its refund claims. None was provided. Treasury moved for summary disposition arguing that Santander failed to meet the

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statutory requirements for obtaining a refund under the GSTA because repossessed property is expressly excluded from the definition of bad debt and because Santander has failed to demonstrate that tax was paid on the vehicle transactions at issue.

The Court of Claims issued nearly identical opinions in each case, granting Treasury summary disposition under MCR 2.116(C)(10) and affirming the denial of Santander's refund. (Santander 5/20/2015 Ops, attached as Ex D.) Specifically, the Court of Claims followed the rationale in *Daimler Chrysler Services of North America, LLC v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals dated Jan 21, 2010 (Docket No. 288347, Ex C), concluding that bad debt does not include repossessed property. (Santander 5/20/2015 Ops, pp 4-5.)

As it relates to Treasury's position that Santander did not provide the necessary documentary evidence that sales tax was actually paid by providing verified RD-108 forms, the Court of Claims held that it "will not overrule the Department's judgment in a matter that the Legislature has explicit placed in the Department's control" and emphasized that "the claimant has the obligation to establish the right to a refund." (Santander 5/20/2015 Ops, p 3.)

The Court of Appeals affirms the Court of Claims

The Court of Appeals consolidated the three cases and affirmed the lower court decisions in a single published decision. As to repossessed property, the Court of Appeals held that Treasury's interpretation of the statute is consistent with the plain and unambiguous language of the statute – all repossessed property is

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excluded from the definition of bad debt. (Op, pp 11-12.) The Court of Appeals declined Ally and Santander's invitation to depart from the language of the statute to allow for a pro rata deduction based on concepts of fairness in favor of applying the law as written, as required. (Op, p 12.) With respect to proof required to show that sales tax was paid on the underlying transaction, the Court of Appeals held that given the rules regarding statutory construction in general as well as the rules applicable to tax exemptions and deductions, Treasury was within its right to require Ally and Santander to submit verified RD-108s as proof that the taxes had been paid. (Op, p 9.) The Court of Appeals also rejected the notion that Treasury must engage in formal rule-making in order to determine what evidence must be produced to support a taxpayer's claim under the bad debt statute. (Op, p 10.)

As to written elections, the Court of Appeals agreed with the Court of Claims that that Ally's written elections did not satisfy the requirements of the bad debt statute. In so concluding, the Court of Appeals relied on the plain and unambiguous language of the GSTA requiring the entity remitting tax to the State and the lender to execute and maintain a written election designating which party may claim the refund. Ally's written elections, by their clear and unambiguous terms, were executed and dated *after* the bad debt had been written off and applied only the debts "currently existing or created in the future." Thus, the election agreements were insufficient. (Op, p 7-8.)

Ally and Santander have now filed an application with this Court.

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ARGUMENT

I. Under the GSTA's plain meaning, Ally and Santander fail to meet the requirements under the bad debt exemption and are not entitled to sales tax refunds as a matter of law.

The General Sales Tax Act provides:

> [T]here is levied upon and there *shall be collected from all persons engaged in the business of making sales at retail*, by which ownership of tangible personal property is transferred for consideration, an annual *tax for the privilege of engaging in that business* equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. [MCL 205.52(1), emphasis added]

There are numerous statutory exemptions from sales tax. Tax exemptions are disfavored and the burden of proving entitlement to an exemption rests on the party asserting the right to the exemption. *Andrie, Inc v Dep't of Treasury*, 496 Mich 161, 165 (2014); *Elias Bros Restaurant v Dep't of Treasury*, 452 Mich 144, 150; (1996). In this case, Ally and Santander seek a refund of sales tax under MCL 205.54i.

Section 54i of the GSTA is known as the "bad debt statute" and provides that a taxpayer may deduct the amount of the taxable portion of bad debts from his or her gross proceeds used for the computation of tax. MCL 205.54i. The statute requires gross proceeds be charged-off as uncollectable on the books and records of the taxpayer at the time the debt becomes worthless and deducted on the return for the period during which the bad debt is written off as uncollectable in the claimant's books; it also must be eligible to be deducted for federal income tax purposes. MCL 205.54i(2). Moreover, a claim for a bad debt statute *must* be supported by "that evidence required by the Department." MCL 205.54i(4). And Treasury must ensure

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that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt. *Id*.

The initial question in any bad debt refund analysis is to identify whether the claimant is a "taxpayer" entitled to a bad debt deduction or refund. If the claimant is a "taxpayer," the transaction at issue must meet the statutory definition of "bad debt." If these requirements are satisfied, the bad debt deduction may be claimed by a lender if the retailer who reported the tax and the lender execute and maintain a written election designating which party may claim the deduction. MCL 205.54i(3). The claimant must also establish that sales tax was paid on the transactions at issue, and in what amount. MCL 205.54i(4). It is that simple.

In this case, Ally and Santander meet the statutory definition of a taxpayer for the time period at issue.[4] But the Court of Appeals properly determined that Ally and Santander are not entitled to the refund because both entities fail to meet the requirements of MCL 205.54i in three specific ways.

[4] For the tax years at issue in this case, "taxpayer" includes both a person that has remitted sales tax directly to the department or a lender holding an account receivable for which the bad debt is recognized. MCL 205.54i(1)(e). Prior to October 1, 2009, only the entity who remitted sales tax to the State of Michigan could seek a bad debt refund under the GSTA. The Michigan Legislature amended the GSTA to provide that, after September 30, 2009, a lender holding the account receivable for which a bad debt is recognized may claim the bad debt deduction or refund if certain requirements are met. 2007 PA 105; MCL 205.54i(1)(e).

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First, under the GSTA repossessed property is excluded from the definition of bad debt. Second, there is no proof that sales tax was paid on the underlying transactions. Third, Ally did not execute and maintain a written election meeting the requirements of MCL 205.54i(3).

A. The GSTA expressly excludes repossessed property from the definition of bad debt.

The GSTA defines bad debt as the portion of a debt related to a taxable sale at retail eligible to be claimed as a deduction pursuant to section 166 of the internal revenue code. MCL 205.54i(1). Subsection 54i(1) expressly excludes the following from the definition of bad debt:

- Finance charge, interest, or sales tax on the purchase price;
- Uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid;
- Expenses incurred in attempting to collect any account receivable or any portion of the debt recovered;
- Any accounts receivable that have been sold to and remain in the possession of a third party for collection; and,
- **Repossessed property**.

MCL 205.54i(1) (emphasis added).

The role of the courts is to discern the legislative intent from the plain language of the statute, enforce the statute as written if the language is clear and unambiguous, and to construe the statute as necessary to give effect to every word in the statute. *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 471 (2013). A court must avoid a construction that would render part of the statute surplusage or

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nugatory. *Id.* Likewise, the court cannot add a requirement "that the law making body has seen fit to omit." *In re Hurd-Marvin Drain*, 331 Mich 504, 509 (1951). According to the plain and unambiguous language of the statue, all repossessed property is excluded from the definition of bad debt.

Ally and Santander claim that the statute allows for the recovery of sales tax on the net unpaid balances of accounts where collateral is repossessed. (App, p 12.) In other words, they argue that the statute supports a pro-rata refund. But, it does not. As currently written, the statute does not except the uncollectable amounts, or the portion of bad debt that is actually recouped or the amounts for which a taxpayer takes an actual economic loss.

If the Legislature had intended for the refund to include "the remaining balance after reducing it by the value of repossessed property," it would have provided for that in the statute. In fact, several provisions of the GSTA allow for apportionment, meaning that the exemption can be divided. See MCL 205.54q (exemption for not for profit tax-exempt organizations), MCL 205.54t and MCL 205.54y (exemption for property used in industrial processing), MCL 205.54u (exemption for property used in extractive operations) and MCL 205.54dd (exemption for property used as or at a mineral-producing property). But the bad debt refund provision, according to its plain and unambiguous language, does not allow for apportionment.

The Court of Appeals agreed that the plain language of the statute precludes any portion of repossessed property. (Op, p 12-13.) The Court of Appeals declined

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to depart from the plain language of the statue, as Ally and Santander requested, citing that the "[p]roper role of the judiciary is to interpret and not write the law." (Op, p 12.) As already noted, this conclusion follows directly from MCL 205.54i(1)(a) ("a bad debt shall not include . . . repossessed property"). This simple application of statutory language does not require this Court's review.

Applying the statutory language, Treasury defines bad debt to exclude all accounts containing repossessed property from a bad debt deduction.

1. Treasury's interpretation of the GSTA is entitled to respectful consideration.

Treasury's longstanding policy excludes all repossessed property from bad debt refund claims as evidenced by Revenue Administrative Bulletin (RAB) 1989-61. (Santander Ex 11.)[5] RAB 1989-61 provides that a bad debt deduction for sales tax purposes shall not include any amount represented by the following:

1. Interest or finance charge;

2. Sales tax charged on the original sale;

3. Uncollectable amounts on property where property remains in the possession of the vendor until the full price is paid, i.e. property placed on layaway;

4. Expenses incurred in attempting to collect any account receivable or any portion of an account that is subsequently recovered;

5. Any debt or account receivable that has been sold, assigned or transferred to a third party for collection;

[5] Through the issuance of a RAB, Treasury explains its current interpretations of current state tax laws. See *JW Hobbs Corps v Dep't of Treasury*, 268 Mich App 38, 46 (2005).

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6. **Sales tax charged on property that is subsequently repossessed;**

7. A sale where tax was paid more than 4 years prior to the bad debt claim. [Emphasis added.]

Although this RAB does not have the force of law, it is entitled to respectful consideration. See *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 21 (2004). And RAB 1989-61 is consistent with the GSTA, which expressly excludes repossessed property from the definition of bad debt. The *Daimler Chrysler Services* panel also gave deference to Treasury's longstanding position set forth in RAB 1989-61 because it is "consistent with the plain and unambiguous language of the statute." (Santander Ex A, p 4.)

Treasury is charged with administering the tax laws of Michigan and its interpretation of the bad debt provision of the GSTA must be upheld because it is consistent with and carries out the intent of MCL 205.54i. Michigan's bad debt statute has been in place for more than 20 years, and Treasury has interpreted repossessed property in the same manner for more than 20 years. Treasury's interpretation set forth in RAB 1989-61 is entitled to respectful consideration.

The Court of Appeals agreed, finding that Treasury's interpretation of the bad debt statute, which is consistent with the statutory language itself, should be afforded respectful consideration consistent with the case *In re Complaint of Rovas*, 482 Mich 90, 108 (2008). (Op, p 11.) Whether based on the plain language of the statute or Treasury's interpretation, Ally and Santander cannot include any transactions involving repossessed property in their refund claim.

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2. Regulations adopted in other states are irrelevant to the outcome of this case.

Unlike the language of the Michigan bad debt statute or Treasury's position on repossessed property as set forth in RAB 1989-61, Ally and Santander favor regulations from other states such as like Wisconsin and Tennessee, under which they could attain the refunds they seek. Ally and Santander argue "all the other 49 states" interpret their bad debt statutes inconsistently with Michigan. (App, p 16-22.) Not true.

For instance, Arkansas treats repossessed property just like Michigan. Under Arkansas's administrative code, "[d]ebts that are secured by tangible personal property that has been repossessed upon default do not qualify for the bad debt deduction." Ark Admin Code 006.05.212-GR-18(J)(5).

Regardless, the interpretation of the Michigan GSTA is not controlled by another state's interpretation of its own statute. It is controlled by Michigan's rules of statutory construction. Further, Treasury's interpretation of the GSTA enforces the statute's plain language. Regulations from Tennessee, Wisconsin, or any other state are irrelevant to the outcome of this case.

Equally unavailing is Ally and Santander's argument that the Streamlined Sales and Use Tax Agreement (SSUTA) controls. (App, p 16-17.) Ally and Santander noticeably fail to state why or on what legal authority the SSUTA trumps state law. The SSUTA was enacted to provide a streamlined system of sales and use collection and to simplify sales and use tax administration to reduce the burden on tax compliance. Public Act 174 of 2004. There are four basic principles

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of simplification under the SSUTA: (1) to ensure that state taxes are remitted to one place, (2) to ensure that the sales and use tax base is the same thorough the State, (3) to ensure the sales and use tax rate is the same through the State, and (4) to provide uniform destination sourcing. See MCL 205.805.

The SSUTA does not change or govern the GSTA. The SSUTA provides that: "[a]ny provision of the agreement or any application of a provision of the agreement to any person or circumstance that is inconsistent with any law of this state does not have effect." MCL 205.811(1). Additionally, "[n]o provision of the Agreement in whole or part invalidates or amends any provision of the law of a member state. Adoption of the Agreement by a member state does not amend or modify any law of the state." MCL 205.811(5). Accordingly, even if another SSUTA member interprets its own statute differently, such interpretation cannot override Michigan law.

Further, the SSUTA does not define "repossessed property." Even if it did, the SSUTA does not govern interpretation of Michigan statutes. Another SSUTA member-state's definition of repossessed property is not a substitute for applying the Michigan rules of statutory construction. Under Michigan's rules of statutory construction, "repossessed property" cannot be expanded to exclude the balance remaining after repossession as Ally and Santander suggest because it improperly adds language into the statute. The Court of Appeals properly enforced the statute as written.

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B. Ally and Santander fail to substantiate their refund request with documentation establishing that sales tax was paid on the accounts at issue.

Even if Ally and Santander were entitled to include repossessed property in their refund claim, which they are not, the refund claims at issue still fail because Ally and Santander did not provide proof showing sales tax was, in fact, paid on the underlying vehicle sales, and if so, in what amount. In order for there to be a refund of tax, the tax first must be paid. And, the party seeking the refund bears the burden of proving its refund claim.

When interpreting a statute, courts should "give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass v Dep't of Treasury*, 494 Mich 237, 247-248 (2013). Courts must "avoid construction that would render any part of the statute surplusage or nugatory [and] the statute must be read as a whole [with] [i]ndividual words and phrases [being] read in the context of the entire legislative scheme." *Michigan Properties, LLC v Meridian Twp*, 491 Mich 518, 528; (2012) (citations omitted.)

The GSTA requires the claimant to prove that sales tax was paid on the transactions at issue. MCL 205.54i(4). Moreover, under the GSTA any claim for a bad debt deduction "shall be supported by *that evidence* required by the department." MCL 205.54i(4) (emphasis added). Through this subsection, the Legislature confers authority on the Department to determine the evidence necessary to support the refund.

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Treasury judiciously exercises this Legislative grant of power by requiring verifiable evidence already in the taxpayers' possession or that the taxpayer can easily access to support its refund claims. Treasury requires, as a matter of course, that the claimant provide evidence that tax was paid on the transaction, which is consistent with the statute. Specifically, if bad debt is claimed as the result of the sale of a vehicle Treasury requires that taxpayers submit a validated Form RD-108 associated with the vehicle at issue to establish that sales tax was paid, and in what amount.

1. Claimants must provide a validated Form RD-108 to prove payment of sales tax.

An RD-108—Application for Michigan Title & Registration Statement of Vehicle Sale—is the Department of State form used to apply for registration or transfer of a vehicle. The form is filled out by a car dealer and submitted to the Secretary of State, and includes information such as the odometer reading, purchase price of the vehicle, and the amount of sales tax due, if any, upon the sale of the motor vehicle. Form RD-108 is submitted to the Secretary of State along with sales tax due on the transaction, unless the sale is exempt from law from sales tax. If the sale is exempt from tax, then no tax will be due. MCL 257.815(1). The Secretary of State issues a vehicle title upon payment of the applicable sales tax or where the transaction is exempt from tax. MCL 257.815(2). Along with issuing the vehicle title, the Secretary of State validates the form by applying a bar-code-type number that confirms the form was filed, and returns a validated copy of the RD-108 to the dealer.

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A validated RD-108 is a receipt confirming the payment of any applicable tax of the vehicle sale. Proof of tax payment is the only way Treasury can ensure that it is not refunding any more or less than the tax imposed on the transaction as required by MCL 205.54i(4). Not only does the validated RD-108 verify the payment of tax, but it is also the easiest way for the lender to verify the payment of tax. The dealer receives a validated copy of the RD-108 it submits back from the Secretary of State[6]. So, the lender could easily ask the dealer for this form. Alternatively, the lender could request a validated RD-108 directly from the Secretary of State for a small fee.

The validated RD-108s are not in Treasury's possession, nor is the Secretary of State required to give Treasury this documentation. Ally and Santander misunderstand MCL 257.815(2) when they assert that the Secretary of State provides a copy of validated RD-108 forms to Treasury. (App, p 30.) This statute actually states that each application for registration shall be accompanied by a statement showing the amount of sales tax due upon the sale of the motor vehicle. MCL 257.815(2). This is not the same thing as an RD-108, which is an Application for Michigan Title and Registration. The dealer submits the RD-108, and sales tax, directly to the Secretary of State. The Secretary of State remits sales tax to Treasury in a lump-sum payment, not separated by individual purchase. The Secretary of State is an entirely different agency from the Department of Treasury

[6] Presumably, this information would be provided by the dealer to the lender after the sale.

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and operates independently of Treasury. And the statute does not require the Secretary of State to provide Treasury with a copy of the RD-108.

A validated RD-108 is seemingly the easiest manner for Ally and Santander to prove that sales tax was paid. When a customer purchases a vehicle, the dealer completes the form RD-108 and submits it to the Secretary of State. (App Br, p 15.) The Secretary of State validates the form, which establishes that sales tax was paid, and returns the form to the dealership. As the assignees of the accounts, Ally and Santander should have no trouble obtaining this documentation from the dealerships. In fact, Santander provided validated RD-108s for eleven vehicles in its initial refund claim. (Santander Exs 5, 9-10.) And Treasury paid refunds on these accounts. (Santander Exs 5, 9-10.) This fact belies Santander's argument that by requiring validated RD-108s in transactions involving sales of motor vehicles Treasury erects artificial barriers that make it impossible for lenders to ever have a claim paid. (App, p 30.) Alternatively, Ally and Santander could request title histories through the Secretary of State on their own.[7]

Contrary to Ally and Santander's argument, Treasury need not promulgate a specific rule under the Administrative Procedures Act that requires a claimant submit a validated RD-108 to demonstrate payment of sales tax on the underlying transactions. (App p 27-28.) Indeed, it is well settled that Treasury's policy determinations are an exercise of its discretionary authority, and Treasury is not

[7] Title histories, including validated RD-108s, can be ordered through the Secretary of State's website, www.mi.gov/sos.

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required to promulgate a rule in order to enforce discretionary authority that is granted to it by the Legislature. *CMS Energy Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2013 (Docket No. 309172, Ex E), p 7, citing *Trinova Corp v Dep't of Treasury,* 433 Mich 141, 164–165 n 26; (1989) (finding that clearly expressed legislative procedures and requirements are "in no way dependent upon the adoption of formal procedural rules").[8]

The Court of Appeals correctly held that, consistent with the rules of statutory construction and the rules applicable to tax exemptions and deductions, Treasury was within its right to require Ally and Santander to submit validated RD-108 forms as proof that taxes had, in fact, been paid. (Op, p 9.) The Court of Appeals also held that the fact that Treasury has not engaged in formal rule-making does not mean that it has been divested of discretion in determining what evidence must be produced to support a taxpayer's claim under the bad debt statue. (Op, p 10.)

Notably, Ally and Santander fail to offer alternative documentation that establishes sales tax was actually paid. The burden of proof cannot fall on Treasury to obtain the documentation to substantiate Ally and Santander's refund requests.

[8] Treasury acknowledges that unpublished opinions of the Michigan Court of Appeals are not binding authority under the doctrine of stare decisis. MCR 7.215(C)(1). However, the reasoning by the Court of Appeals is persuasive. See *Beyer v Verizon North, Inc*, 270 Mich App 424 (2006).

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2. Ally and Santander fail to provide any documentation proving payment of sales tax.

Instead of providing validated RD-108s for each vehicle, Ally and Santander submitted self-serving spreadsheets that identify the sales that are *subject* to tax based on the type of property sold. They also rely on installment contracts, invoices, and RD-108 applications (copies of applications submitted to but not validated by the Secretary of State) that again identify only sales that are *subject* to tax. Ally and Santander argue that it should be sufficient enough that a vehicle sale is a type of transaction *subject* to sales tax to show that sales tax was paid and relies on spreadsheets it created that identify the sales that are subject to tax based on the type of property sold. (App, p 30-31.) This positions fail for two reasons.

First, in MCL 205.54i(4), the Legislature gave Treasury, *not* the taxpayer, the authority to determine what evidence is necessary to substantiate a refund claim. Yet Ally and Santander want to determine what type of evidence is sufficient. Ally and Santander's position is inconsistent with the plain statutory language and it renders as surplusage and nugatory the provision giving Treasury authority to determine what type of evidence is necessary.

Second, the type of evidence Ally and Santander offer is not sufficient. None of the documentation Ally or Santander provide or rely upon demonstrates that sales tax was actually *paid* to the Secretary of State. The plain language of the statute requires that the sales tax is paid, not simply the type of transaction subject to sales tax—as Ally and Santander argue.

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Moreover, and contrary to Ally and Santander's claim, the fact that a vehicle is titled in Michigan does not prove that sales tax was paid on the sale of the vehicle. (App, p 30.)

While a vehicle sale is a type of transaction that is *subject* to sales tax, sales tax is not is not due and paid on every vehicle sale. This is because some vehicle sales are exempt from tax (i.e. certain vehicles sold to a nonprofit school under MCL 205.54a(1)(a), or certain vehicles sold to a church or house of religious worship MCL 205.54a(1)(b)). In such instances, vehicles are titled absent any payment of sales tax on the purchase. MCL 257.815(2). Thus, the fact that the Secretary of State issues a vehicle title alone does not demonstrate that tax was paid on the purchase. Ally and Santander's evidence—the mere fact that the sale was *subject* to sales tax and that a vehicle was titled—fails to establish that sales tax was actually paid on the transactions and in what amount as required by statute.

Where the claimant seeking a bad debt deduction fails to submit the documentation required by Treasury, it fails to satisfy MCL 205.54i(4). Ally and Santander are not entitled to the refunds they seek. The Court of Appeals did not err.

C. Ally cannot obtain a bad debt refund because it failed to execute and maintain written elections with the dealers for the accounts at issue in this case.

Notwithstanding repossessed property and the payment of sales tax, Ally's refund claim still fails for yet another reason because Ally did not execute and maintain written elections with the dealerships as required by MCL 205.54i(3) for

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the accounts at issue. After October 1, 2009, a bad debt deduction may be claimed by a lender if the retailer who reported the tax and the lender execute and maintain a written election designating which party may claim the deduction. Ally failed to maintain written elections for the accounts at issue, so it cannot obtain a refund. It is that simple.

1. The written election is a prerequisite to the claimant seeking a bad debt refund.

The GSTA makes clear that the written election is required before a claimant can obtain a bad debt refund. Prior to October 1, 2009, only the taxpayer who remitted sales tax to the State of Michigan could seek a bad debt refund under the GSTA. The Legislature expanded the definition of taxpayer so that after September 30, 2009, a lender may obtain a bad debt deduction or refund if it maintained a written election with the retailer designating which party may claim the deduction. The statute states, "After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund" of sales tax on worthless accounts, provided certain additional conditions are met.[9] MCL 205.54i(3).

The word "if" as used in MCL 205.54i(3) creates a condition that must be satisfied before lender can seek a bad debt sales tax refund. See *In re Casey Estate*, 306 Mich App 252, 260 (2014) (relying on the dictionary definition of the word "if" as

[9] Treasury agrees the accounts receivable have been found worthless and written off by the taxpayer as required by MCL 205.54i(3)(b).

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meaning "in case that; granting or supposing that; on condition that"). The Legislature's use of the word "if" at the start of the subsection is critical. *Id.* By beginning the subsection with the word "if" the Legislature created a condition that, if not satisfied, means that the remainder of the subsection does not come into play. *Id*. Accordingly, in the GSTA the word "if" creates the condition that the lender and the taxpayer who reported the tax must execute and maintain a written election designating the party that can claim the bad debt deduction in order to obtain the refund.

Practically speaking, it is also logical for the Legislature to require the written election. This ensures that Treasury is not issuing refunds in excess of the amount of sales tax actually remitted. Under the GSTA's expanded definition of taxpayer, there are two entities that can theoretically claim the deduction—the retailer that remitted tax to the Department and the lender holding the account receivable. The written election requirement ensures that Treasury is not issuing refunds on the same account to two entities. In the absence of a sufficient written election, Treasury cannot determine whether the party seeking the refund is entitled to claim the refund.

Here, Ally is the lender and did not remit sales tax to the State of Michigan. Therefore, as the Court of Appeals correctly held, under the plain language of the statute, Ally must have maintained a "written election designating which party may claim the deduction." (Op, p 6.)

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2. The written elections provided by Ally do not apply to the accounts at issue in this case.

More than a year into litigation, after ordered by the trial court, Ally's counsel provided Treasury's counsel with 286 pages of purported written elections. The election agreements submitted by Ally are insufficient for two reasons. First, several of the election agreements relate to dealerships not at issue in this case, and second, the election agreements do not apply to the accounts at issue.

As to the first problem with the election agreements, the GSTA requires the written election to be between the dealer that *remitted the sales tax* and Ally. Here, several of the written elections were between Ally and dealerships unrelated to Ally's refund request. Ally identified on its spreadsheets the dealership associated with each account in its refund request. Many of the written elections provided by Ally do not correspond to the dealerships identified on the spreadsheets. For instance, Ally provided a written election for Sterling Heights Dodge, but Sterling Heights Dodge is not one of the dealerships associated with Ally's refund request. Ally also has failed to provide agreements for each dealership identified on its refund request.[10] Those elections that Ally actually submitted were insufficient.

As to substance of the forms, the statute requires the parties (here, the dealership and lender) to "execute and maintain" a written election stating which party may claim the deduction. In this case, the "Agreement for Entitlement to

[10] In its Court of Appeals brief, Ally admitted that it only provided documents purporting to be written elections for a portion of, and not all, of its refund request. (Ally Appeal Br, p 12.)

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Refund, Deduction or Credit" produced by Ally applies to accounts "currently existing or created in the future." (Ally Ex 7.) The agreements are all dated in 2013 or 2014—*after* the time Ally wrote off the debt for federal income tax purposes. The term "write-off" means a cancellation in account books or an amount canceled or lost. *The American Heritage Dictionary, Second College Edition* (1982). When Ally wrote off the debts, it cancelled the debt, and the accounts were no longer existing. Because the accounts did not exist at the time the dealerships entered into the agreements with Ally there is no written election for the accounts at issue.

Ally argues that its own election agreements are ambiguous and that the phrase "accounts currently existing or created in the future" actually includes accounts that existed prior to the execution of the election. This cannot be accurate. There cannot be any factual dispute regarding the contents of the "Agreement for Entitlement to Refund, Deduction or Credit." The primary goal of contract interpretation is to ascertain and effectuate the intent of the contracting parties. *City of Grosse Pointe Park v Michigan Mun Liab & Prop Pool*, 473 Mich 188, 218-219 (2005). The law presumes that the intent of the parties is embodied in the actual words used in the contract. *Id.* at 219. The election itself states that it only applies to accounts written-off as of the date the elections were signed.

The Court of Appeals correctly rejected Ally's argument, concluding that the language of the forms was clear and as a result, there was no basis to look beyond the plain language of the forms and consider surrounding circumstances. (Op, p 7.) The Court of Appeals relied on rules of well-settled tenants of contract law that

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"when parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires the enforcement of the terms and conditions contained in such contracts, if the contract is not contrary to public policy." (Op, p 7.)

Ally's failure to provide sufficient written elections, for all accounts for which it seeks a refund, requires a denial of its refund request in its entirety. The Court of Appeals did not err.

CONCLUSION AND RELIEF REQUESTED

This case does not warrant this Court's consideration. The Court of Appeals did not err in finding that Ally and Santander are not entitled to the bad debt refunds they seek under the GSTA. Repossessed property is expressly excluded from the GSTA's definition of bad debt. Likewise, under the plain language of the GSTA, Treasury may require claimants to provide validated RD-108s to show that sales tax was paid on the underlying transactions, which Ally and Santander failed to provide. Ally's failure to provide valid written elections, as required by the GSTA, serves as the final basis for denying the refund claims. Because the Court of Appeals did not err, this Court should deny leave.

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